86-116

No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

D.A. RICKARDS, M.A. CUSTER, PAUL V. BELKIN AND JOHN S. SLEASMAN,
Petitioners,

VS.

CANINE EYE REGISTRATION FOUNDATION, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LAWRENCE ALIOTO
ALIOTO & ALIOTO
650 California Street
23d Floor
San Francisco, CA 94108
(415) 434-2100
Attorney for Petitioners

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

32 pp

QUESTIONS PRESENTED

1. In an antitrust defendant's counterclaim alleging that the antitrust suit brought against it was within the sham exception to the Noerr-Pennington doctrine, did the evidence adduced by the antitrust plaintiff preclude summary judgment in favor of the antitrust defendant where there was credible evidence that:

(a) The antitrust defendant's own counsel, a distinguished firm of lawyers, had written an opinion to the effect that the antitrust defendant's exclusionary policies might be the basis of antitrust liability;

(b) The Federal Trade Commission had expressed interest in looking at the antitrust defendant's exclusionary policies;

(c) The antitrust plaintiffs, respected veterinarians, all testified that they sought redress in the courts with the expectation they would win and the belief they were right, albeit also with the intention of putting an end to defendant's operation, which the antitrust plaintiffs perceived as a positive evil;

(d) Plaintiff's antitrust claim was disposed of only after considerable discussion and debate on the merits, in both the trial court and the Court of Appeals?

2. If an antitrust case is brought with the intent of putting an end to defendant's operation or business, which business plaintiffs perceive to be a serious threat to their own livelihoods, is such intent to destroy a competing operation alone sufficient to support a finding that the antitrust case is within the sham exception to the Noerr-Pennington doctrine, even though the antitrust plaintiffs reasonably expect to win?

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OPINION BELOW

The opinion and judgment of the Ninth Circuit Court of Appeals from which the present petition is brought is reported at 783 F.2d 1329 (Decided February 27, 1986). That opinion and the order denying rehearing are printed in the Appendix hereto. An earlier opinion in this case is reported at 704 F.2d 1449 (9th Cir. 1983), *cert. den.* 104 S.Ct. 488.

JURISDICTIONAL STATEMENT

This petition is filed within 90 days of the Court of Appeals' denial of rehearing, which occurred on April 29, 1986. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Petitioners D.A. Rickards, M.A. Custer, Paul V. Belkin and John S. Sleasman are individual veterinarians who are licensed to

practice veterinary medicine in the states of Ohio, California, Missouri and Washington, respectively. Each appellant has established and attempted to pursue a special clinical interest in the field of veterinary ophthalmology.

The Canine Eye Registration Foundation, Inc. ("CERF"), which is the respondent, is a non-profit, tax exempt organization established by the late Dr. Lawrence and Dolly Trauner for the purpose of collecting and disseminating information concerning hereditary eye disease in dogs by establishing a registry of purebred dogs. In order to register a dog, CERF requires that its eyes be examined by a veterinarian certified by the American College of Veterinary Ophthalmologists ("ACVO"). ACVO members evaluate the dogs using forms provided by CERF and charge a fee to the dog's owner. The ACVO veterinarian then returns a copy of the form to CERF with his diagnosis. If the owner remits the original of the CERF form back to CERF with a $5.00 registration fee, CERF will issue a certificate to the owner indicating whether the dog suffers from a hereditary eye defect.

In 1970, the ACVO was founded as an exclusive honor society by a group of professors of veterinary ophthalmology who, for the most part, did not practice clinical veterinary medicine. (RT 4256-59). These founders and certain other privileged early members were "grandfathered" into the ACVO. Subsequently, veterinarians wishing to become certified specialists in veterinary ophthalmology were required to pass a series of tests devised by the original members. Twenty-four of the thirty-three ACVO members practicing in 1975 at the time that CERF was formed had been grandfathered into the college without having been required to take an exam. (RT 2049-51; 2054-56)

None of the petitioners are members of the ACVO. Although both Dr. Rickards and Dr. Belkin applied for membership, neither was accepted. Neither Dr. Custer nor Dr. Sleasman ever applied for ACVO membership. As a result, notwithstanding their demonstrated and recognized ability to conduct hereditary eye examinations on dogs of all breeds (RT 2415-17; PXs 358, 359 and 186), because they were not ACVO members, none of the petitioners could perform canine eye examinations registerable by CERF.

Petitioners brought an antitrust action against CERF and the Trauners. CERF counterclaimed in antitrust, alleging that petitioners' action was sham and frivolous. The District Court granted a directed verdict against petitioners on petitioners' antitrust case. An appeal was taken and the Ninth Circuit affirmed the directed verdict. *Rickards v. Canine Eye Registration Foundation, Inc.*, 704 F.2d 1449 (9th Cir.). This Court denied certiorari 104 S.Ct. 488 (1983).

The action was remanded for trial of the counterclaim, the gravamen of which was that petitioners' original action herein was sham and frivolous and therefore within the exception of the Noerr-Pennington doctrine. After a trial of several weeks the issue of whether petitioners' original action was sham was submitted to a six person jury, but a mistrial was declared because certain documents had improperly gone into the jury room. The trial judge, a Magistrate, then invited the parties to file cross-motions for summary judgment, which they did. The Magistrate granted CERF's motion, holding on summary judgment, after the mistrial, that petitioners' original action herein, since dismissed, was sham and frivolous. The Magistrate did this in the face of evidence, summarized in Judge Merrill's subsequent dissent (Appendix, pp. A-13 and A-14), that: (1) CERF's law firm, Kirkland & Ellis, had advised CERF that the CERF-ACVO combination, insofar as it excluded non-ACVO members from performing eye examinations, might be a violation of the antitrust laws; (2) the Federal Trade Commission had expressed interest in looking at CERF's exclusionary policies; (3) all petitioners believed they had a good case against CERF and expected to win; (4) disposition of petitioners' antitrust action required extensive discussion on the merits, both in the District Court and in the Ninth Circuit (704 F.2d 1449). The Magistrate then awarded to CERF the attorney's fees CERF had expended in defending petitioners' antitrust action. This figure was $416,893.99. A judgment for treble this amount (i.e. $1,250,951.51) was then entered against petitioners, together with attorney fees of $35,879.86 and costs. The Ninth Circuit affirmed, Judge Merrill dissenting. Petitioners seek in this Court an order reversing the judgment in favor of CERF and remanding CERF's counterclaim to the trial court for further jury trial.

Petitioners respectfully contend in this Court: (1) That the evidence adduced by petitioners presented a genuine issue of fact, precluding summary judgment, on CERF's claim that petitioners' antitrust case was sham and frivolous; (2) that the Court of Appeals and the District Court applied the wrong substantive rule in judging CERF's allegations that petitioners' antitrust case was sham. Whether a lawsuit is sham or frivolous should depend on whether plaintiff intended to prevail *and* had some reasonable expectation that he might prevail (see Judge Merrill's dissent). It should not depend merely upon a finding that plaintiff intended to put defendant out of business, which is the standard utilized by the Ninth Circuit ("... the uncontradicted record in this case, however, shows that the Rickards group filed their action against CERF not because of a good faith belief that CERF had violated the antitrust laws, but as part of a concerted plan to force CERF out of the veterinary ophthalmology market. This kind of litigation deserves all the chilling effect the law allows." Appendix, p. A-8). Certainly there have been many antitrust cases in which plaintiff, often the government, was motivated by an intent to break up or dismantle what plaintiff perceived to be a monopolistic or anticompetitive organization or program. Practically all antitrust injunction actions partake of that intent. This Court should articulate the substantive definition of a sham or frivolous lawsuit.

REASONS FOR GRANTING THE WRIT

1. The decision in this case is at odds with the important First Amendment policies stated by this Court in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 103 S.Ct. 2161 (1983) and *California Transport v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609 (1972). The present decision impinges not only on the right to petition the government for redress of grievances through a lawsuit, but also makes incursions upon the fundamental Fifth Amendment due process right to be heard. *The Noerr Doctrine and its Sham Exception*, Handler & De Sevo, 6 Cardozo Law Review, cases cited at fn. 121.

2. Henceforth in competitor cases any antitrust defendant's lawyer may be remiss if he does not allege by way of counterclaim

that the antitrust suit brought against his client is sham and frivolous. Such an allegation may permit the antitrust defendant to recover its attorney fees, times three. In competitor cases, a responsible plaintiff's lawyer must advise prospective plaintiffs that if they lose they may be liable for a judgment of three times defendant's attorney fees. These considerations will prevent the bringing of many meritorious antitrust cases. To that extent the decision below conflicts with the Congressional policy favoring private enforcement of the antitrust laws and conflicts with decisions of this Court, such as *Beacon Theatres v. Westover*, 359 U.S. 500, 504 (1959) encouraging the private antitrust action.

3. The decision below is erroneous. Manifestly this record presents a genuine issue of fact precluding summary judgment on the question of whether plaintiffs' original suit was a sham. Also, the trial court and the Court of Appeals have not correctly formulated the definition a sham or frivolous lawsuit. If plaintiffs reasonably expect to prevail, their lawsuit is not frivolous.

ARGUMENT

1. The Record Contains Ample Evidence Precluding Summary Judgment in Favor of the Antitrust Defendant on that Defendant's Counterclaim Alleging a Sham, Frivolous, or Baseless Suit

The relevant and fundamental inquiry on the counterclaim is to determine whether the petitioner doctors entertained a "good faith belief that CERF had violated the antitrust laws" and therefore filed their lawsuit with proper motives or whether the doctors filed their suit as part of "a concerted plan to force CERF out of the veterinary ophthalmology market." (Opinion, at p. 10.) This inquiry, however, of necessity requires the finder of fact to probe each doctor's state of mind. It is for this reason that this Court has held in *Standard v. Swint*, ____ U.S. ____, 1102 S.Ct. 1781, 1790 (1982) that "findings as to the design, motive and intent with which men act" are always questions of fact for the jury.

The majority opinion below states that the record is "uncontradicted" that the doctors acted with the anticompetitive intent to eliminate CERF. This is incorrect.

Dr. Rickards testified as follow on cross-examination:

> Q. Because the destruction of CERF is what you wanted to accomplish in this lawsuit; isn't that correct?
>
> A. *No.* (RT 5001).

* * *

> Mr. Hainline: Q. Isn't it a fact that you were thinking lawsuit at least as early as 1977?
>
> A. Yes, but I have to add that what I was talking about here was the ASVO meeting where we had voted to refer this to the legal committee, and I said, *"Let's hope it can be resolved without legal action."* (RT 4951).

* * *

> Q. In connection with the college. So in 1973, you went to your lawyer in connection with the college. In '77, you wrote to Dr. Price, and in 1978, when you wrote KQ in evidence, you had in mind, didn't you, doctor, that if you couldn't get what you wanted, you would bring a lawsuit to accomplish it?
>
> A. I had in mind that *if there was a violation of the law,* something ought to be done about it. (RT 4951-52).

On direct examination, Dr. Rickards testified concerning his motives and his intent in bringing the lawsuit:

> Q. Doctor, finally, let me ask you this: why did you file this lawsuit?
>
> A. Because I believe in justice, because I felt sincerely that I had been wronged and hurt, damaged financially, damaged my reputation, and not just myself but many people across the country who were not in a position to fight back or who were too far away from the mainstream of things to stick

> up for themselves, and I sincerely believed it was something which had to be done, ought to be done, and we did it. (RT 4659).

Dr. Belkin testified that he would not have brought the lawsuit but for the patent discrimination he saw being effected against non-ACVO members (RT 5392-93).

Dr. Sleasman testified that his reasons for joining in the lawsuit involved the good of the profession:

> Q. What was the purpose and what was your state of mind when you agreed to file this lawsuit?
>
> A. After a great deal of deliberation, and the fact that I was aware that CERF was not going to have any designates allowed, I saw my business, what I perceived my business, to be interfered with, I felt that there was an illegal activity [discrimination], in my opinion, that was occurring, and I felt this was bad, not only for myself, but for my breeders, for my owners. I thought it was awful bad for the profession and I did not want to see similar what I would call conspiracies occur and damage what I consider an excellent profession, and *I felt that I should stand up for what I felt and the only way appeared to me that I was going to stand up for what I felt was to join in the lawsuit.* (RT 3617).

In addition, the following lines show very clearly that Dr. Sleasman had no intent to eliminate CERF:

> "Q. *But your view was you would just as soon see them eliminated?"*
>
> "A. *No, I thought the idea of CERF is a fine idea and I—I didn't think that CERF should be eliminated.* I was either willing to be included in CERF or have CERF stop the stuff [illegal discrimination] that they were doing, but *I had no desire to have CERF eliminated."* (19 RT 3519-20).

Finally, Dr. Custer testified about the frustration he experienced in attemping to forfend litigation with CERF and the ACVO:

Q. Prior to filing this lawsuit, doctor, *did you . . . attempt to work out the problems so that the lawsuit wouldn't be necessary?*

A. *I certainly did.*

Q. What did you do?

A. Well, we had the discussions at our national [ASVO] meetings and I was appointed to one of the committees, one of the three committees that have tried to approach CERF and the ACVO.

* * *

And this has been mentioned before at trial, and we went to the Jack Tar Hotel to see if we could get a designate status, knowing that was in the Constitution and Bylaws of CERF, and since we had tried through ACVO, they would not have anything to do with us and so we tried with CERF in 1977 and they passed the buck back to the ACVO. It felt like a pingpoing ball to me, going back and forth. Everyone saying no, it's the other person's responsibility.

And then I attended a meeting in 1976 even preceding that of the ACVO in Las Vegas hoping that we could talk to someone and do something about it.

* * *

Q. And anything else that you did in an attempt to forestall the lawsuit?

A. Oh, many conversations. Many brief meetings trying to figure out what we could possibly do to, could be done to correct the situation.

Q. All right. And tell us, if you would, Dr. Custer, the Court and the jury, *why did you eventually file this suit?*

A. *We had no recourse. We had nothing left.* Admittedly, the CERF had closed up their sending of registration certificates, but they were still doing the eye exams out there in the field for the purpose quote of collecting scientific data, but we full well know that [one] day they can just announce

to all the breeders, "Send in your $5.00 and get your certificate," and they are back in business in twenty-four hours. They didn't really close it up as to this, the effect on those of us who are interested in, truly interested in doing well for the animals.

I just don't think that a small group of veterinanrians, inclusive group, should have that control and they should be out trying to get more veterinarians to examine these dogs and to do as many of those dogs as we can. (RT 3780-82).

In addition, independent evidence shows that the doctors had legitimate reasons to believe that CERF's activities were illegal and in violation of the Sherman Act. As early as March 10, 1978, Kirkland and Ellis, the law firm advising the AVMA, wrote that there was indeed the potential that lawsuit against CERF and the ACVO could succeed:

"Nevertheless, as a preliminary matter *we can envision certain hypothetical combinations of the foregoing facts and circumstances which would render the constitutional provision [discriminating against non-ACVO members] subject to attack as a violation of the antitrust laws.* For example, an antitrust plaintiff, presumably a non-certified veterinarian, could conceivably allege that the constitutional provision constituted a conspiracy by CERF and certain competing veterinarians or veterinarian organizations to cause 'owners of purebred dogs' (CERF Constitution, Article III, Section 1-C) not to deal with plaintiff and other similarly situated non-certified veterinarians. Proof of such an allegation would depend on development of the facts and circumstances discussed in the preceeding paragraph, and possibly on other related matters.

Petitioners obtained a copy of this letter the following month and Dr. Rickards observed:

"It was a revelation to me. I felt convinced that what some of us had believed right along was true, and that there was, in fact, a violation of the laws." (RT 4641: 23-25).

On August 14, 1978, Kirk Gelatt, President of the ACVO wrote to his fellow diplomates of the ACVO and advised them that he had been contacted by an attorney for the FTC who had requested a written report on the CERF-ACVO relationship. (PX 271, Excerpt of Record at p. 108). Dr. Rickards also spoke to the FTC during this period and, based upon those conversations, testified that he was persuaded that CERF's arrangement with the ACVO was a violation of the federal antitrust laws. (RT 4645: 8-14). In fact, the FTC advised the doctors that excluded veterinarians may have a lawsuit against CERF and the ACVO for violation of the Sherman Act. (RT 4641-54).

On October 16, 1978, Kirk Gelatt, wrote to CERF and told Mrs. Trauner that his own attorney had advised him that CERF should open its examinations to all veterinarians and not limit its program to just ACVO members:

> "I have met recently with our attorney, Dr. William Casler of St. Petersburg Beach, relative to the CERF — designate problem. He recommended the following — 'that CERF provide ophthalmic examination forms to all requests and therefore permit CERF examinations by any veterinarian.' " (PX 279, Excerpt of Record at p. 110).

Although Dr. Rickards suspected that there was an antitrust suit as early as March of 1978 when he saw the Kirkland & Ellis opinion letter, he did not file the lawsuit until October, 1979, over a year and a half later. Instead, as Dr. Custer testified at RT 3780-82, he and other doctors attempted to work out a plan that would allow all qualified veterinarians to conduct CERF examinations.

On July 1, 1978 Dr. Rickards wrote that his sole motivation was to keep the practice of ophthalmology open to non-college veterinarians who wished to practice in it and not restrict ophthalmology to the privileged few who were members of the ACVO:

> ". . . I firmly believe that this is a country of laws and not of men. No group has the power, to disqualify and requalify those who were making a living doing something legitimately. In this case, examining eyes for a living." (DX KW, Supp. Excerpt of Record, Vol. II).

Even Mrs. Trauner admitted that petitioners may have been justified in bringing this lawsuit against CERF when she testified:

> "Q. The question is, do you see anything wrong with a citizen going into the courts to try and stop something that is discriminatory?
>
> A. *If that is his belief*... if he believes he is being discriminated against in some fashion illegally, *then certainly I couldn't deny him the right to go to court to seek redress.* (RT 2924: 5-12)

Petitioners' testimony, including their denials of anticompetitive motives, coupled with the extrinsic evidence recounted above when viewed in the light most favorable to petitioners instead of in the light most favorable to CERF, clearly supports an alternative interpretation of petitioners' conduct than the interpretation which has been embraced by the majority below. This evidence requires that the issue of petitioners' good faith be resubmitted to the jury.

2. The Lower Courts Have Not Properly Defined Sham or Frivolous Litigation; Litigation Brought With the Reasonable Expectation of Prevailing Is Not Sham

Upon this issue petitioners cannot do better than to adopt the language of Judge Merrill's dissent:

"The district court made no factual findings on the issue; it simply held that the lawsuit was "baseless and a sham." As backing for the conclusion that it was, the majority opinion cites only the concerted refusal to deal which showed the group's "anticompetitive motivation." But the desire to harm a competitor does not make a lawsuit a sham. Many antitrust suits have the goal of discomfiting competitors.

"Rather, the relevant inquiry is whether the Rickards group intended to prevail and had some reasonable expectation that it might prevail. This is true even if the group intended to "destroy" CERF. "Genuine efforts to induce governmental action are shielded by *Noerr* even if their express and sole purpose is to stifle or eliminate competition." *Clipper Exxpress v. Rocky Mountain*

Motor Tariff Bureau, Inc., 690 F.2d 1240, 1254 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983). The issue is whether the underlying action was commenced "without regard to merit or possible success . . . [and] without any intent to induce favorable action" by the government. *Id.*" (Appendix, p. A-13).

Such a definition protects the First Amendment and due process considerations which are involved in the right to invoke the power of the courts. The First Amendment considerations are summarized in *Bill Johnson's Restaurants, Inc. v. NLRB*, 103 U.S. 2161, at pp. 2169-2170 (1983). That was one of the more recent cases which the majority opinion of the Court of Appeals brushed aside in affirming the present judgment.

3. This Court Should Examine the Relationship Between State Law, Malicious Prosecution Law and the Sham Suit As a Sherman Act Violation

It is important to decide how, if at all, the Noerr-Pennington sham exception is different from state law malicious prosecution actions. Why should a sham lawsuit be an antitrust violation, triable in the federal courts? Why is not the common law remedy entirely adequate to one who believes himself agrieved by a sham antitrust case? Why should there be co-existing definitions of what constitutes a sham lawsuit, a federal definition and a particular state's statutory or judge-made definition? Why should one carry treble damages, the other only single? Is not the state law policy requiring a final determination of the allegedly sham lawsuit before permitting allegations that the suit is sham and frivolous a salutary one from the point of view of the administration of justice? The present case presents an excellent vehicle by which this Court can stem the rising tide of the counterclaim alleging that plaintiff's antitrust action is sham.

CONCLUSION

The Petition should be granted.

July 22, 1986

LAWRENCE ALIOTO
ALIOTO & ALIOTO
Attorneys for Petitioner

United States Court of Appeals
For the Ninth Circuit

No. 84-2185
CV 79-3053 SAW(FSL)

D.A. Rickards; M.A. Custer, Paul V. Belken
and John S. Sleasman,
Plaintiffs-Counterdefendants-Appellants,

v.

Canine Eye Registration Foundation Inc.,
Lawrence M. Trauner, et al.,
Defendants-Counterclaimants-Appellees.

[Filed April 29, 1986]

ORDER

Before: Merrill and Goodwin, Circuit Judges and Williams, District Judge**

Judges Goodwin and William have voted to deny both appellant Sleasman's petition for rehearing and appellants Rickards, Custer and Belkins' petition for rehearing. Judge Merrill has voted to grant the petitions for rehearing.

Appellants' petitions for rehearing are denied.

** Honorable David W. Williams, Senior U.S. District Judge, for the United States District Court for the Central District of California, sitting by designation.

United States Court of Appeals
For the Ninth Circuit

No. 84-2185
CV 79-3053 SAW(FSL)

D.A. Rickards; M.A. Custer, Paul V. Belkin
and John S. Sleasman,
Plaintiffs-Counterdefendants-Appellants,

v.

Canine Eye Registration Foundation, Inc.,
Lawrence M. Trauner and Dolly B. Trauner,
Defendants-Counterclaimants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Owen E. Woodruff, Jr., Chief United States Magistrate and
F. Steele Langford, United States Magistrate, Presiding*
Argued and submitted June 12, 1985—San Francisco

[Filed Feb. 27, 1986]

OPINION

Before: Merrill and Goodwin, Circuit Judges and Williams, District Judge**

Goodwin, Circuit Judge

D.A. Rickards, M.A. Custer, Paul V. Belkin and John S. Sleasman ("Rickards group") appeal from the grant of summary judgment in favor of Canine Eye Registration Foundation, Inc., Lawrence M. Trauner and Dolly B. Trauner, ("CERF") defendants and counterclaimants in this antitrust action. The district court granted summary judgment on the CERF counterclaim,

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* Owen E. Woodruff, Jr., Chief United States Magistrate, presided over the case until he retired.

** Honorable David W. Williams, Senior U.S. District Judge, for the United States District Court for the Central District of California, sitting by designation.

which challenged the Rickards group's original action as a violation of the antitrust laws. We affirm.

I. BACKGROUND

The dispute between these parties is before us for the second time. In *Rickards v. Canine Eye Registration Foundation, Inc.*, 704 F.2d 1449 (9th Cir.), *cert. denied*, 104 S. Ct. 488 (1983) ("*Rickards I*"), the district court granted CERF's motion for summary judgment, and entered a directed verdict denying the Rickards group recovery in their antitrust action, and we affirmed. The district court stayed the CERF counterclaim pending the disposition of this first appeal.

The underlying facts of this dispute were discussed in *Rickards I* and need not be discussed at length here. *See id.* at 1451-52. CERF was established as a non-profit organization to collect and disseminate information concerning hereditary eye disease in dogs. It operated a registry listing certain breeds of purebred dogs. Only dogs examined by veterinarians certified by the American College of Veterinary Ophthalmologists ("ACVO") were permitted to conduct the examination required before a dog was listed in the registry. The Rickards group were non-ACVO certified veterinarians, and thus were not permitted to perform the examinations required for CERF registration. This dispute centers on the efforts of the Rickards group either to be allowed to perform such examinations, or to drive CERF from the veterinary ophthalmology market. We turn briefly to the CERF counterclaim.

The counterclaim alleged that the Rickards group had violated sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2 (1982)), filed a vexatious complaint for an improper purpose, wrongfully interfered with CERF's present and prospective business relationships and had violated the California Cartwright Act and Unfair Trade Practices Act (Cal. Bus. & Prof. Code §§ 16,600, *et seq.*, 16,720 *et seq.*, and 17,000 *et seq.* (West 1964)).

Both the Rickards group and CERF filed cross-motions for summary judgment, and after the motions were fully briefed and argued, the magistrate, sitting as trial judge by stipulation of the parties, granted CERF's motion for summary judgment.

On March 1, 1984, the magistrate signed an order for partial final judgment and held that the Rickards group had (1) violated section 1 of the Sherman Act under both the rule of reason and per se standards; (2) violated Section 2 of the Sherman Act by engaging in a conspiracy to monopolize and an attempt to monopolize trade or commerce; and (3) brought a lawsuit which was baseless and a sham, and in furtherance of their overall scheme to violate the antitrust laws. The court awarded CERF $416,893.99 in damages, and trebled that amount pursuant to 15 U.S.C. § 15 (1982).

After the retirement of the magistrate who originally heard the case, it was assigned to another magistrate. The Rickards group's motion to alter or amend the March 1, 1984 judgment was denied on May 30, 1984 after further briefing and a hearing, and this timely appeal followed.

II. DISCUSSION

We review the grant of summary judgment de novo, and apply the same test as did the district court. *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). Thus, "[a]ll 'evidence and factual inferences' must be viewed in the light most favorable to the adverse party and the summary judgment may be upheld only if 'there are no genuine issues of material fact and [the movant is] entitled to judgment as a matter of law.' " *Alaska v. United States*, 754 F.2d 851, 853 (9th Cir. 1985) (quoting *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141, 1145 (9th Cir.), *cert. denied*, 104 S. Ct. 141 (1983)).

We note that while antitrust conspiracies do not ordinarily lend themselves to summary disposition, *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1050 (9th Cir.), *cert. denied*, 104 S. Ct. 156 (1983), summary judgment is sometimes appropriate in antitrust cases. *Landmark Development Corp. v. Chambers Corp.*, 752 F.2d 369, 371-72 (9th Cir. 1985); *ALW, Inc. v. United Air Lines, Inc.*, 510 F.2d 52, 55 (9th Cir. 1975). Furthermore, a judgment may be sustained on any ground sup-

ported by the record. *Freuhauf Corp. v. Royal Exchange Assurance of America*, 704 F.2d 1168, 1171 (9th Cir. 1985).

The principal issue on appeal is whether the record supports summary judgment. The Rickards group contends that numerous fact questions required resolution by trial. They have failed, however, to identify, either in their briefs or at oral argument, any disputed material question of fact which was not answered by uncontradicted affidavits or other documentary evidence in the record.

A. Section 1 Violation

To establish a section 1 violation by the Rickard group, CERF had to prove three elements: (1) an agreement or conspiracy, (2) resulting in an unreasonable restraint of trade, and (3) causing "antitrust injury." *Gough v. Rossmoor Corp.*, 585 F.2d 381, 386 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979). The record is replete with correspondence proving an agreement on the part of the Rickards group to drive CERF out of business. While the mere expression of anticompetitive intent is insufficient to establish a section 1 claim, the record establishes acts committed in furtherance of the conspiracy. The Rickard group's vexatious litigation clearly affected CERF's business or property in a negative way; and the injury was of the type cognizable under the antitrust laws.

1. *The Concerted Refusal to Deal.*

The record indicates that after the Rickards group had failed in its efforts to convince CERF to allow veterinarians lacking ACVO-certification to participate in the CERF program, they encouraged ACVO members to stop dealing with CERF. There is evidence that this boycott of CERF met with some success. The minutes of the July 18, 1978 Executive Board meeting of the American Society of Veterinary Ophthalmology ("ASVO"), the professional organization established by the Rickards group, state that "[t]he ACVO members present did indicate that they had cut all ties with CERF." The district court concluded that the Rickards group's concerted refusal to deal with CERF violated

section 1 under both a per se and a rule of reason analysis. We hold that a per se analysis is inappropriate under these facts.

The per se rule governs only if the practice at issue "facially appears to be one that would always or almost always tend to restrict competition and decrease output." *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*, 104 S. Ct. 2948, 2960 (1984) (quoting *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979)). Some practices, such as horizontal price-fixing, are clearly subject to a per se analysis. *E.G., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). While there is some older case law suggesting that group boycotts are per se violations of section 1, *see, e.g., Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13 (1959); *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1211 (9th Cir 1983), *cert. denied*, 105 S. Ct. 1874 (1985), the Supreme Court's most recent pronouncement on concerted refusals to deal requires that we look to the type of boycott at issue to determine if per se condemnation is required. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 105 S. Ct. 2613, 2619 (1985). Unless the challenged activity "falls into a category likely to have predominantly anticompetitive effects," the per se analysis of a concerted refusal to deal claim is overbroad. *Id.* at 2621. Anticompetitive effect is unlikely unless the boycotting part "possesses market power or exclusive access to an element essential to competition." *Id.* Nothing in the record suggests that the Rickards group possessed dominance in the veterinary ophthalmology market, or that it controlled an element essential to competition. On the contrary, it was CERF's growing position in veterinary ophthalmology that triggered the Rickards group's concerted action against it. Therefore, under *Northwest Wholesale Stationers*, the district court's application of a per se analysis to the Rickards group's boycott was premature.

The district court found in the alternative that the Rickards group's concerted action violated section 1 under the rule of reason. Under this analysis, the moving party must establish that the action unreasonably restrained competition. *See Jefferson Parish Hospital District v. Hyde*, 104 S. Ct. 1551, 1567 (1984).

CERF attempted to meet its burden by showing that it temporarily suspended its registration activities during the pendency of the Rickards group's antitrust suit against it. CERF subsequently reentered the market. Nothing in the record indicates that the boycott was the cause of the suspension of its registration business. In fact, the record suggests that the lawsuit was the only cause. Further, CERF may have lost profits from the temporary disruption of its business but failed to assert the claim. Therefore, we cannot affirm the district court's finding that the Rickards group's urging of ACVO members not to deal with CERF of itself violated section 1.

Although we reject the district court's finding of section 1 liability for the concerted refusal to deal orchestrated by the Rickards group, the court nonetheless made a valid finding of section 1 liability. The district court awarded CERF $416,893.99 in damages on its counterclaim.[1] This figure represents the amount spent by CERF in its defense against the antitrust suit filed against it by the Rickards group. Because a single lawsuit, when brought for anticompetitive purposes, may under certain circumstances constitute a violation of section 1, we affirm the district court's finding of liability on that basis. *See e.g., Omni Resource Development Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1414 (9th Cir. 1984) (single suit may constitute antitrust violation when coupled with anticompetitive conduct external to the suit).

2. *The Noerr-Pennington Doctrine.*

Under the *Noerr-Pennington* doctrine, the petitioning of government is immune from antitrust liability. *See Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Although the doctrine as initially developed protected the petitioning of the legislative and executive branches, it was later extended to immunize from antitrust liability those who seek redress in the courts. *See California Transport v. Trucking Unlimited*, 404 U.S. 508, 510 (1971). The *Noerr-Pennington* immunity is not, however, absolute. Immunity is not afforded to those who resort to sham or

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[1] The figure was then trebled under 15 U.S.C. § 15 (1982) and attorney's fees for the prosecution of the counterclaim were added.

unfounded litigation solely for anticompetitive purposes. *Omni Resource Development Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1413 (9th Cir. 1984). The Supreme Court has applied the sham exception when a meritless lawsuit is one of a pattern of baseless and repeated claims. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973). This circuit has held that a single meritless suit may also be sufficient to forfend the *Noerr-Pennington* immunity. *Omni Resource*, 739 F.2d at 1414; *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1257 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983). Our cases require, however, that the sham lawsuit be accompanied by additional evidence of anticompetitive activity before immunity will be called off. We stated in *Omni*:

> When the antitrust plaintiff challenges one suit and not a pattern, a finding of sham requires not only that the suit is baseless, but also that it has other characteristics of grave abuse, such as being coupled with actions or effects external to the suit that are themselves anti-competitive. . . .
> 739 F.2d at 1414.

In this case we have a baseless lawsuit coupled with the evidence of a concerted refusal to deal which the trial court found sufficient, alone, to support liability. Although there is no evidence that the attempted boycott itself caused any cognizable antitrust injury, it provides sufficient corroboration of the Rickards group's anticompetitive motivation to warrant the application of the sham exception to *Noerr-Pennington*.

The application of the sham exception to single lawsuits may have a chilling effect on those who in good faith seek redress in the courts. The threat of treble damages may discourage the filing of meritorious claims, or preclude plaintiffs from asserting novel or cutting-edge theories of liability. Thus, we must apply the sham exception with caution. The uncontradicted record in this case, however, shows that the Rickards group filed their action against CERF not because of a good faith belief that CERF had violated the antitrust laws, but as part of a concerted plan to force CERF out of the veterinary ophthalmology market. This kind of litigation deserves all the chilling effect the law allows. Further, the filing of suit was not the only overt act committed in

furtherance of the conspiracy. The Rickards group sought to deprive CERF of the services of ACVO-certified veterinary ophthalmologists for its registration program. While the boycott, standing alone, did not support section 1 liability, its evidentiary value in explaining the lawsuit could not be ignored. The trial judge's finding of sham litigation on the paper record before him was the kind of inference drawing protected by Rule 52(a). *Anderson v. City of Bessemer City,* ___ U.S. ___, 105 S. Ct. 1504, 1511-12 (1985).

3. *Antitrust Injury.*

CERF's sole damage claim is that of the costs incurred in defense against the baseless suit filed against it. Despite the application of the sham exception to *Noerr-Pennington,* CERF is not entitled to recover merely because its litigation costs were incurred as a result of the Rickards group's violation of section 1 of the Sherman Act. In order to recover, CERF must prove that the injury was "of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). We have held that the costs incurred in the defense of a suit filed in violation of the antitrust laws constitute antitrust injury as defined in *Brunswick. Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 997 (9th Cir. 1979) ("*Handgards I*"), *cert. denied*, 444 U.S. 1025 (1980). After our decision in *Handgards I*, the Supreme Court construed *Brunswick* to require that the injury alleged in an antitrust suit be "of the type that the antitrust statute was intended to forestall." *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 540 (1983). Because CERF has an adequate state law tort remedy for the Rickards group's abuse of process, we question whether the injury at issue is of the type that Congress sought to redress in enacting the Sherman Act. This Court has specifically held, however, that the principles of antitrust standing set forth in *Associated General Contractors* did not affect our holding in *Handgards I* that the costs of litigating a frivolous suit are cognizable under the antitrust laws. *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1297 (9th Cir. 1984) ("*Handgards II*"), *cert. denied*, 105 S. Ct. 963 (1985).

We hold that because the *Noerr-Pennington* immunity does not apply and because CERF claims damages that are treated as antitrust injury in this circuit, summary judgment for counter-claimants on their section 1 claim was proper.

B. Section 2 Violation

To establish a section 2 attempt to monopolize violation, CERF had to prove four elements: "(1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury." *Rickards I*, 704 F.2d at 1455.

The record contains proof of specific predatory intent and anticompetitive conduct. The evidence shows that the Rickards group intended to keep lay persons from running a registry and that they employed threats of litigation to give effect to this intent. The Rickards group now contends that even if they made the purported threats, these threats do not support section 2 liability because there is no proof that the Rickards had or approached monopoly power. We agree.

The "dangerous probability of success" element may under some circumstances be inferred from direct evidence of specific intent coupled with anticompetitive conduct. *See William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1029 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982). When, however, there is no proof of market dominance, the conduct supporting an inference of specific intent to monopolize must be "of a kind clearly threatening to competition or clearly exclusionary." *Forro Precision, Inc. v. International Business Machines Corp.*, 673 F.2d 1045, 1059 (9th Cir. 1982), *cert. denied*, 105 S. Ct. 2664 (1985). CERF has made no such showing. It has shown only that the Rickards group through its filing of a sham lawsuit inflicted costs upon it that are recoverable under *Handgards I*. It has demonstrated no serious threat to competition in the veterinary ophthalmology market. CERF's own re-entry into that market after the grant of summary judgment in its favor in *Rickards I* cuts against any such finding.

In *Forro Precision*, this court found "implausible" the inference of specific intent to monopolize the worldwide market for electronic data processing products and services from the discreet harm inflicted by IBM against one vendor of IBM-compatible equipment. 673 F.2d at 1061-62. CERF asks us to draw an equally implausible inference. It defines the relevant product market as "veterinary services in general." The claim that the Rickards group, through an attempted boycott of CERF and the filing of a single lawsuit, was attempting to monopolize the nationwide market for all veterinary services is, at best, implausible. Therefore, we hold that the summary judgment in favor of CERF on its section 2 claim was unsupported by the record. Because the damages awarded resulted from the section 1 violation, the magistrate's damage award need not be adjusted despite the lack of section 2 liability.

C. The Damages

Appellants challenge the calculation of damages, asserting that CERF has (1) claimed costs as well as attorney's fees as compensable damages, and (2) failed to allocate and remove from its damage claim the attorney's fees charged in prosecution of the counterclaim.

We may reverse the district court's findings of damages only if it was "clearly erroneous," Fed. R. Cov. P. 52(a), and we must be convinced that a "mistake has been committed." *Reid Brothers Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1299 (9th Cir. 1983) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)), *cert. denied*, 104 S. Ct. 279 (1983). No error was committed here.

The cost of defending itself in the first lawsuit through its several appeals is an injury that CERF would not have suffered but for the Rickards group's suit against it. The prevailing party need only provide some basis for a reasonable estimate of damages, *D & S Redi-Mix v. Sierra Redi-Mix and Contracting Co.*, 692 F.2d 1245, 1249 (9th Cir. 1982), and CERF has supported its antitrust damage claim for the wrongful infliction of the costs

of this litigation. The district court's damage award was not clearly erroneous.

D. Validity of the Judgment

Finally, appellants assert that the magistrate did not sign the original judgment until March 2, 1984, one day after he had retired, and the judgment is thus void. This contention is not supported by the record. The judgment which appellants challenge is dated March 1, 1984. In addition, CERF explains that appellants' confusion arose due to the fact that the letter with the judgment was misdated because of leap year. We presume that judgments by a court of competent jurisdiction are regular and correct. *Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940). The presumption is not rebutted in this case. The judgment is valid.

AFFIRMED.

D. A. Rickards, et al., v.
Canine Eye Registration, et al.,
No. 84-2185

[Filed Feb. 27, 1986]

Merrill, Circuit Judge:

I dissent.

I cannot agree that as a matter of law the suit brought by the Rickards group was sham and that for that reason, as a matter of law, the *Noerr-Pennington* doctrine does not provide immunity from antitrust liability.

The district court made no factual findings on the issue; it simply held that the lawsuit was "baseless and a sham." As backing for the conclusion that it was, the majority opinion cites only the concerted refusal to deal which showed the group's "anticompetitive motivation." But the desire to harm a competitor does not make a lawsuit a sham. Many antitrust suits have the goal of discomfiting competitors.

Rather, the relevant inquiry is whether the Rickards group intended to prevail and had some reasonable expectation that it might prevail. This is true even if the group intended to "destroy" CERF. "Genuine efforts to induce governmental action are shielded by *Noerr* even if their express and sole purpose is to stifle or eliminate competition." *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1254 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983). The issue is whether the underlying action was commenced "without regard to merit or possible success . . . [and] without any intent to induce favorable action" by the government. *Id.*

Here, the Rickards group knew that CERF's own law firm had warned CERF about possible antitrust problems. The Federal Trade Commission had expressed interest in looking at CERF's exclusionary policies. The group members themselves testified at trial that they had believed CERF's practices to be illegal. A repetitive series of losing lawsuits would present a different case. Here we are faced with a single lawsuit. Further, it was one that the Rickards group saw fit to present to this court on appeal and

after losing here to the Supreme Court on petition for certiorari. The case before this court required a substantial published opinion of 6 pages with 18 headnotes. *Rickards v. Canine Eye Registration Foundation, Inc.*, 704 F.2d 1449 (9th Cir.), *cert. denied*, 464 U.S. 994 (1983). This does not look sham to me.